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No. 82-1077

In the Supreme Court of the United States

OCTOBER TERM, 1982

KEYSTONE CABLE-VISION CORPORATION
AND JAMES S. WILLIAMS, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BRUCE E. FEIN
General Counsel
Federal Communications Commission
Washington, D.C. 20554

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Petitioners challenge the court of appeals' summary affirmance (Pet. App. 5A) of a decision by the Federal Communications Commission not to rescind the registration statement of a rival cable television operator. The petition presents no issues that warrant further review.

1. The FCC has always left the selection of local cable television franchisees to local governmental authorities. See, *e.g., Cable Television Report and Order*, 36 F.C.C. 2d 143, 207 (1972). In 1978, the Commission adopted a registration procedure, which requires cable franchisees prior to the start of operations to provide the Commission with basic information about system identification, location, and signal carriage. *Report and Order in CT Docket No.*

78-206, 69 F.C.C. 2d 697, 703 (1978).[1] The Commission emphasized, however, that "[t]he filing of this information is solely for the purpose of providing the Commission with certain basic information * * * and, in contrast with the certification procedure, does not create a forum in which disputes concerning proposed operations may be resolved." *Id.* at 703.

On January 30, 1980, the City of Pittsburgh granted Warner Amex Cable Communications, Inc. and Warner Cable Corp. of Pittsburgh (Warner) a cable television franchise. Warner filed its registration statement with the Commission on April 1, 1980. On December 14, 1980, petitioner Keystone Cable-Vision Corporation (Keystone), which has long pursued its own claim to construct and operate a cable television system in Pittsburgh, [2] petitioned the agency for rescission of Warner's registration statement.

The Commission's Cable Television Bureau denied Keystone's petition, and the company sought reconsideration (Pet. App. 6A & 8A). The FCC refused to grant reconsideration. It noted that "the Commission does not affirmatively act upon registration statements as authorizing instruments, but utilizes such statements solely for informative

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[1]The registration procedure replaced the agency's certification procedure, which had been adopted in *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972). The certification procedure was intended to ensure that all new cable proposals were reviewed for consistency with Commission rules. When it eliminated the certification procedure in 1978, the Commission noted that the need for prior review was greatly diminished by the cable industry's demonstrated familiarity with the Commission's rules and by the existence of effective enforcement tools to deal with instances of noncompliance (*Report and Order in CT Docket No. 78-206, supra*, 69 F.C.C.2d at 699, 701).

[2]Keystone has twice unsuccessfully sued the City of Pittsburgh on the ground that it has wrongly denied Keystone a cable television franchise. *Keystone Cable-Vision Corp.* v. *City of Pittsburgh*, No. GD76-23612 (Pa. Ct. Comm. Pleas Nov. 18, 1976); *Keystone Cable-Vision Corp.* v. *FCC*, 464 F. Supp. 740 (W.D. Pa. 1979).

purposes" (*id.* at 6A); and stated that the registration process is not "a forum in which disputes concerning proposed operations may be resolved" (*id.* at 8A). On petition for review, the court of appeals summarily affirmed (Pet. App. 5A) and denied rehearing (*id.* at 1A-2A).[3]

2. Although confusingly couched, Keystone's underlying claim appears to be that the City of Pittsburgh wrongly denied it the cable franchise which was subsequently awarded to Warner. Whatever the merits of this contention (which two courts have already rejected[4]), any wrong that Keystone suffered is attributable to the city's franchising decision and not to Commission action.[5] The Commission's ministerial act of accepting Warner's registration statement does not furnish a basis for relief; the agency has lawfully chosen not to oversee local government grants of cable television franchises. See *Cable Television Report and Order, supra.*

Keystone's invocation (Pet. 13) of a policy under the old certification program of issuing certificates of compliance in those exceptional cases where there was no local authority capable of issuing a franchise[6] is doubly inapposite. The policy ended with the certification program five years ago, and in any event never applied where an authority with the power to franchise chose not to make an award. *In re*

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[3]The court of appeals had previously dismissed an earlier Keystone petition for judicial review on the ground that there was no final agency order (Pet. App. 3A). Petitioners' argument (Pet. 7, 20-21) that this earlier dismissal is somehow in conflict with the court of appeals' disposition of the instant case is frivolous.

[4]See page 2 note 2, *supra.*

[5]The City of Pittsburgh is not a party in this case.

[6]*Clarification of the Cable Television Rules,* 46 F.C.C. 2d 175, 189 (1974).

Keystone Cable-Vision Corp., 67 F.C.C.2d 348, reconsideration denied, 68 F.C.C.2d 1419, 1420 (1978). Keystone also mistakenly relies (Pet. 7, 13) on this Court's recent decision in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), to argue that a city may not grant a cable television franchise without express state authority and that Pittsburgh has no such authority. *City of Boulder*, however, dealt with an issue not presented here: the scope of the "state action" exemption from liability under the Sherman Act (455 U.S. at 43). Moreover, Keystone has offered nothing to the Commission throughout the course of its persistent litigation to cast doubt on the authority of the City of Pittsburgh to award cable television franchises.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

BRUCE E. FEIN
General Counsel
Federal Communications Commission

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